No. 17-1498

In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

GREGORY A. CHRISTIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
ERIC GRANT
Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
MATTHEW R. OAKES
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Respondents, property owners within a site designated for cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, sued petitioner in state court seeking "restoration damages" for cleanup activities that the Environmental Protection Agency (EPA) did not require in its CERCLA response action.

The questions presented are:

1. Whether respondents' claim for restoration damages presents a "challenge" to an EPA response action over which the state court lacks jurisdiction pursuant to Section 113(h) of CERCLA, 42 U.S.C. 9613(h).

2. Whether respondents are "potentially responsible parties" prohibited from undertaking remedial action without EPA authorization under Section 122(e)(6) of CERCLA, 42 U.S.C. 9622(e)(6).

3. Whether CERCLA preempts respondents' claim for restoration damages.

TABLE OF CONTENTS

Page

<< Table of Contents will generate here >>

TABLE OF AUTHORITIES

Run TOA Insert macro to place cursor for manual TOA insert & remove this text.

In the Supreme Court of the United States

No. 17-1498

ATLANTIC RICHFIELD CO., PETITIONER

v.

GREGORY A. CHRISTIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Petitioner owns a former copper smelter in Montana that is now a Superfund site. Pet. App. 4a. Respondents, who own land within the site, brought an action in state court seeking "restoration damages" to fund cleanup actions beyond those ordered by the Environmental Protection Agency (EPA). *Ibid.* Petitioner contended that the claim was barred or preempted by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.* The state court allowed the claim to proceed to trial. After granting a writ

of supervisory control, the Montana Supreme Court affirmed. Pet. App. 1a-40a.

1. Congress enacted CERCLA "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 4 (2014) (internal quotation marks and citation omitted). Under CERCLA, the President may respond to the "release into the environment" of a "hazardous substance" or "pollutant or contaminant" by ordering "removal" or "remedial" actions that he "deems necessary to protect the public health or welfare or the environment." 42 U.S.C. 9604(a)(1).[1] The federal government may conduct CERCLA cleanup actions itself, "or it may compel responsible parties to perform the cleanup." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004); see 42 U.S.C. 9606(a). "In either case, the Government may recover its response costs." *Cooper*, 543 U.S. at 161. Specifically, CERCLA "lists four classes of potentially responsible persons (PRPs) and provides that they 'shall be liable' for, among other things, 'all costs of removal or remedial action incurred by the'" federal government. *Ibid.* (quoting 42 U.S.C. 9607(a)(4)(A)).

Under CERCLA Section 113(b), federal district courts "have exclusive original jurisdiction over all controversies arising under [CERCLA], without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. 9613(b). Of particular relevance here, CERCLA Section 113(h) provides:

---

[1] The President has delegated most of his CERCLA authority to the EPA. See 52 Fed. Reg. 2923 (1987).

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [in five circumstances not pertinent here].

42 U.S.C. 9613(h).

Under CERCLA Section 122(e)(6), "[w]hen either the President, or a [PRP] * * * has initiated a remedial investigation and feasibility study for a particular facility * * * , no [PRP] may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U.S.C. 9622(e)(6).

CERLCA also includes two relevant savings clauses. Under 42 U.S.C. 9614(a), "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." Under 42 U.S.C. 9652(d), "[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."

2. This case involves an EPA response action at the site of the former Anaconda Smelter, which "processed copper ore from Butte," Montana, "for nearly

one hundred years before shutting down in 1980." Pet. App. 4a. EPA designated the Anaconda Smelter a Superfund site in 1983, and petitioner has conducted extensive remediation work there at EPA's direction for decades. *Ibid.* Among other actions, "EPA required [petitioner] to remediate residential yards within the Smelter Site harboring levels of arsenic exceeding 250 parts per million in soil, and to remediate all wells used for drinking water with levels of arsenic in excess of ten parts per billion." *Ibid.*

In 2008, respondents—98 landowners within the smelter site—sued petitioner in Montana state court. Pet. App. 5a. Respondents asserted claims based on common-law trespass, nuisance, and strict liability, and sought damages in multiple forms. *Id.* at 5a-6a. Of central relevance here, respondents sought "restoration damages," which are available under Montana law to cover the cost of restoring damaged property for owners who "want[] to use the damaged property, instead of reselling it." *Id.* at 6a (citation omitted).

In assessing "what actions would be necessary to fully restore [respondents'] properties to pre-contamination levels," experts recommended that respondents "to remove the top two feet of soil from affected properties and install permeable walls to remove arsenic from the groundwater." Pet. App. 4a. Both those "remedies required restoration work in excess of what the EPA required of [petitioner] in its selected remedy." *Ibid.* Respondents' experts also sought "to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA" at that time, and to "transport[] the excavated soil

to Missoula or Spokane rather than to local repositories, as required by EPA." *Id.* at 72a.[2]

3. Petitioner sought to remove the case on grounds of fraudulent joinder or federal-officer removal, see 28 U.S.C. 1442, but the district court remanded. *Christian* v. *BP Amoco Corp.*, No. 08-cv-45, 2008 U.S. Dist. LEXIS 123882 (D. Mont. Dec. 9, 2008). The state trial court held that respondents' claims were untimely, but the Montana Supreme Court reversed. 358 P.3d 131 (2015). Petitioners then moved for summary judgment on respondents' restoration-damages claim. Petitioner contended that (1) the restoration-damages claim constituted a "challenge[]" to EPA's response action over which the state court lacked jurisdiction pursuant to CERCLA Section 113(h), 42 U.S.C. 9613(h); (2) respondents were PRPs who could not "undertake any remedial action" without EPA approval under CERCLA Section 122(e)(6), 42 U.S.C. 9622(e)(6); and (3) respondents' restoration-damages claim was preempted by CERCLA. The state trial court rejected each of those arguments. Pet. App. 41a-55a.

4. Petitioner petitioned the Montana Supreme Court for a writ of supervisory control, "an extraordinary remedy" that is "sometimes justified" when, *inter alia*, "the case involves purely legal questions." Mont. R. App. P. 14(3). The court granted "the writ for the limited purpose of considering the" district court's denial of petitioner's motion for partial summary judgment on respondent's restoration-damages claim. Pet. App. 5a. The court invited the United States to participate as amicus curiae, and

---

[2] EPA has subsequently amended some aspects of its remedy. Respondents have also submitted additional expert reports.

the government filed a brief contending that the trial court should be reversed on each of the three issues it resolved. *Id.* at 56a-80a.

The Montana Supreme Court affirmed. Pet. App. 1a-40a. The court observed that CERCLA Section 113(h)'s withdrawal of jurisdiction over "challenges" to EPA remedies "[c]onspicuously" lacks "any reference to state court jurisdiction." *Id.* at 9a. The court did not resolve that issue, however, because it concluded that respondents' claim was not a "challenge[]." *Id.* at 10a. In the court's view, "a § 113(h) challenge must actively interfere with EPA's work, as when the relief sought would stop, delay, or change the work EPA is doing." *Id.* at 11a. Because respondents were "not seeking to enjoin any of EPA's activities, or requesting that EPA be required to alter, delay, or expedite its plan in any fashion," but instead "simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan," the court held that respondents' claim was not a "challenge." *Id.* at 13a.

Next, the Montana Supreme Court determined that respondents were not PRPs subject to CERCLA Section 122(e)(6)'s requirement to obtain EPA's authorization before "undertak[ing] any remedial action." 42 U.S.C. 9622(e)(6). The court observed that respondents had not caused the contamination and had "never been treated as PRPs for any purpose." *Id.* at 16a. The court declined to treat respondents as PRPs "solely for the purpose of using § 122(e)(6) to bar their claim for restoration damages." *Id.* at 17a.

Finally, the Montana Supreme Court concluded that CERCLA did not preempt respondents' restoration-damages claim "for the same reason that § 113(h) does not apply: the [respondents'] claim does not prevent the EPA from accomplishing its goals at the" cleanup site. Pet. App. 17a. The court added that CERCLA's savings clauses "expressly contemplate the applicability of state law remedies." *Id.* at 17a.

Justice Baker issued a concurring opinion. Pet. App. 19a-23a. She emphasized that, at trial, petitioner "must be able to address" potential conflicts between respondents' proposed remedy and "measures [petitioner] already has taken to clean up the site." *Id.* at 22a.

Justice McKinnon dissented. Pet. App. 23a-40a. In her view, although CERCLA Section 113(h) expressly refers only to the jurisdiction of "Federal courts," 42 U.S.C. 9613(h), CERCLA Sections 113(b) and (h) "in conjunction * * * divest state courts of jurisdiction to review any state law claim which amounts to a challenge of a CERCLA removal or remedial action," Pet. App. 29a. She rejected the majority's definition of "challenge," reasoning that "[a]n action constitutes a challenge if it is *related to the goals of the cleanup*." *Id.* at 30a (citation omitted). Applying that standard, she concluded "as a matter of law" that respondents' restoration-damages claim is a "challenge" to EPA's remedy because it is "plainly contrary to EPA's remediation plan." *Id.* at 38a-39a (citing examples).[3]

---

[3] "For purposes of brevity," Justice McKinnon did not address petitioner's other contentions. Pet. App. 24a n.1.

DISCUSSION

The Montana Supreme Court erred on all three of the questions it resolved. As EPA explained in its amicus brief below, respondents' restoration-damages claim presents a "challenge[]" to EPA's response action and therefore bars jurisdiction under CERCLA Section 113(h), 42 U.S.C. 9613(h). CERCLA Section 122(e)(6) also forecloses respondents' claim because respondents are PRPs who must obtain EPA authorization before undertaking "any remedial action" at the site. 42 U.S.C. 9622(e)(6). And even if those CERCLA provisions did not expressly bar respondents' claim, CERCLA would preempt it under principles of conflict preemption.

Despite the Montana Supreme Court's errors, several factors counsel against this Court's review. The decision is interlocutory, which creates a question about this Court's jurisdiction and weighs in favor of waiting for final judgment. A threshold question also exists about whether Section 113(h)'s bar on review of "challenges" to EPA response actions applies in state court. 42 U.S.C. 9613(h). The decision below does not create a square circuit conflict on either Section 122(e)(6) or preemption. And most significantly, EPA is not a party to the case and is not bound by the judgment below. EPA therefore retains power under CERCLA to protect its cleanup plan against challenges. That authority limits the practical consequences of the decision below. Although the question is close, the government's view is that this Court's review is not warranted at this time.

A. The Interlocutory Posture Creates A Jurisdictional Question And Counsels Against Review At This Time

As a threshold matter, the interlocutory posture of the case creates a question about this Court's jurisdiction to review the decision below. And even if the Court has jurisdiction, the interlocutory posture counsels against review before final judgment.

1. This Court has jurisdiction over "[f]inal judgments * * * rendered by the highest court of a State" presenting certain federal questions. 28 U.S.C. 1257(a). "To be reviewable by this Court, a state-court judgment must be * * * final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997) (internal quotation marks and citation omitted). The Montana Supreme Court's decision does not meet that standard. The decision is "avowedly interlocutory," in that it "remand[s] the case for further proceedings," including "a trial on the merits of the state-law claims." *Id.* at 81; see Pet. App. 5a, 18a.

Petitioner contends (Pet. Reply 1-2) that the decision is nevertheless "[f]inal" under Section 1257(a) because it finally resolved the petition for a writ of supervisory control. This Court has twice exercised jurisdiction over cases arising from Montana Supreme Court decisions granting writs of supervisory control. See *Fisher* v. *District Court*, 424 U.S. 382, 385 (1976) (per curiam); *Kennerly* v. *District Court*, 400 U.S. 423, 424 (1971) (per curiam). In *Fisher*, the Court explained that a "judgment that terminates original proceedings in a state appellate court, in

which the only issue decided concerns the jurisdiction of a lower state court, is final even[] if further proceedings are to be had in the lower court." 424 U.S. at 385 n.7. That statement does not squarely support jurisdiction here, however, because the Montana Supreme Court did not decide "only issue[]s" that "concern[] the jurisdiction of a lower state court." *Ibid.* Exercising jurisdiction in this case would thus require an extension of the rationale articulated in *Fisher*.

If pressed to resolve the issue, this Court likely would have jurisdiction because the Montana Supreme Court's decision granting the writ of supervisory control can be regarded as finally resolving "a distinct suit." *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931) (exercising jurisdiction over state-court decision denying a writ of prohibition). Although the decision granting a writ of supervisory control in *Fisher* involved only a question of state-court jurisdiction—and although most cases coming before this Court in a similar posture have also involved only questions of state-court jurisdiction, see *Fisher*, 424 U.S. at 385 n.7 (collecting cases)—it is not apparent why a decision conclusively resolving a writ proceeding on a nonjurisdictional question is less "final" for purposes of Section 1257(a) than one resolving a jurisdictional question. See, *e.g.*, *Board of Educ.* v. *Superior Court*, 448 U.S. 1343, 1346 (1980) (Rehnquist, J., in chambers) (relying on *Fisher* without stating that the writ proceeding must involve a jurisdictional question). But the issue is not free of doubt, and if the Court were

to grant certiorari, it should direct the parties to brief the question.[4]

2. Even if the Court has jurisdiction, the interlocutory posture of the case counsels against review. See, *e.g.*, *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568 (1947) (finding jurisdiction to review state-court disposition of a writ of prohibition, but declining to exercise that jurisdiction). The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (statement of Scalia, J.) (collecting authorities). It would be "prudent to take that course here." *Ibid.* Although the decision below is a significant setback, petitioner could still prevail at trial, thus removing any need to review the questions presented. And even if respondents prevail at trial, petitioner could "rais[e] the same issues" presented here "in a later petition, after final judgment has been rendered." *Ibid.* At that point, no question about this Court's jurisdiction would exist. A final judgment would also clarify the relationship between respondents'

---

[4] Petitioner also relies (Pet. Reply 2) on this Court's statement in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), that jurisdiction may exist under Section 1257(a) "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-483. That contention is unpersuasive. As explained further below, "a refusal immediately to review the state court decision" would not likely "seriously erode federal policy," *id.* at 483, because EPA is not bound by the Montana Supreme Court decision and may compel compliance with its cleanup plan through administrative orders or enforcement actions, see 42 U.S.C. 9606(a).

proposed restoration damages and EPA's cleanup plan, both of which have evolved during the litigation. See p. 4 n.2, *supra*. Sound reasons thus exist for adhering to the usual practice of waiting for final judgment.

B. The Montana Supreme Court's Decision On CERCLA Section 113(h) Is Erroneous And Creates A Conflict But Does Not Warrant This Court's Review

Under CERCLA Section 113(h), "[n]o Federal court shall have jurisdiction under Federal law other than under [diversity jurisdiction] or under State law [inapplicable here] to review any challenges to removal or remedial action selected under [42 U.S.C. 9604], or to review any order issued under [42 U.S.C. 9606(a)]." 42 U.S.C. 9613(h). As the government contended below, respondents' restoration-damages claim is a "challenge[]" to the "remedial action selected" by EPA. *Ibid.* The Montana Supreme Court's contrary conclusion is wrong and conflicts with decisions of multiple circuits. There remains, however, a significant question whether Section 113(h) applies to state courts. The court below did not decide that question, the parties have not thoroughly briefed it, few courts have analyzed it, and this Court could avoid resolving it by instead granting a case from federal court involving the meaning of "challenge" in Section 113(h). Leaving the decision below in place in the interim, moreover, will have limited practical consequences, because EPA retains authority to protect its cleanup plan against challenges.

1. The Montana Supreme Court erred in concluding that respondents' claim for restoration damages did not constitute a "challenge[]" to EPA's response

action under CERCLA Section 113(h). 42 U.S.C. 9613(h).

a. When "CERCLA does not specifically define" a term, this Court "give[s] the [term] its ordinary meaning." *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 611 (2009). CERCLA does not specifically define "challenge[]" in Section 113(h), so the term bears its ordinary meaning: "calling in question." *Webster's New Int'l Dictionary of the English Language* 446 (2d ed. 1958). Federal courts of appeals have accordingly explained that a suit is a "challenge[]" under CERCLA Section 113(h) if it "calls into question," *New Mexico* v. *General Elec. Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006); *Broward Gardens Tenants Ass'n* v. *EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002), or "would second-guess," *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 330 (9th Cir.), cert. denied, 516 U.S. 807 (1995), EPA's response action. Other courts of appeals have applied functionally similar formulations, concluding that a suit is a Section 113(h) "challenge[]" if it would "impact the implementation of the remedy that EPA selected," *Schalk* v. *Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990), "interfere with" EPA's response, *El Paso Nat. Gas Co.* v. *United States*, 750 F.3d 863, 880 (D.C. Cir. 2014), or is otherwise "related to the goals of the cleanup," *ARCO Envt'l Remediation, LLC* v. *Department of Health & Envt'l Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000) (citation omitted).

Under any of those related formulations, respondents' restoration-damages claim is a "challenge[]" to EPA's response action. 42 U.S.C. 9613(h). As EPA explained below in detail below,

the remediation measures recommended by respondents' experts "second guess" EPA's response action in numerous ways "related to the goals of the cleanup." *McClellan*, 47 F.3d at 330. Among other contradictions, respondents' experts proposed (1) "to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA," (2) to excavate soil "up to two feet rather than EPA's chosen depth of 18 inches," (3) to transport "excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA," and (4) to construct "a series of underground trenches and barriers for capturing and treating shallow groundwater" that EPA determined "could upset a balance that currently protects human health and the environment." Pet. App. 72a-74a.

Those proposals do not seek simply to supplement EPA's work; they would directly "impact the implementation of the remedy that EPA selected," *Schalk*, 900 F.2d at 1097, and "interfere with" EPA's remedial choices, *El Paso*, 750 F.3d at 880. For example, the proposal to excavate soil in residential yards to two feet rather than 18 inches would not simply require extra digging. When petitioner finishes remediating a yard, the EPA remedy requires that the yard be "capped or backfilled with clean soil." Pet. App. 73a. "Tearing up that protective cap or layer of soil * * * could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion." *Ibid.* Similarly, "[o]ffsite disposal of excavated soil," as respondents' experts propose, "would also increase the risk of dust transfer or contaminant ingestion." *Ibid.* And the underground "barriers proposed by [respondents'] experts * * *

could unintentionally contaminate groundwater and surface water." *Id.* at 74a. Under any plausible definition, a plan that overrules EPA's judgments and requires undoing the work it directed constitutes a "challenge[]" to its response action. 42 U.S.C. 9613(h); accord Pet. App. 37a-39a (McKinnon, J., dissenting).

b. The Montana Supreme Court adopted a narrower understanding of "challenge," stating that a suit must seek to "stop, delay, or change the work EPA is doing." Pet. App. 11a; see *id.* at 13a, 14a (similar formulations). The court did not purport to ground its definition in CERCLA's text, and the result it reached cannot be squared with the result federal courts of appeals would have reached here. Indeed, the court acknowledged that it was permitting respondents "to present *their own plan* to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan," *id.* at 13a (emphasis added), even though EPA had assessed many aspects of that plan and rejected them, see *id.* at 72a-76a. Allowing respondents to pursue "their own" remedial plan even though it conflicts with—indeed, requires undoing parts of—EPA's plan plainly "calls into question," "would second-guess," "impacts," "interfere[s] with" and is "related to the goals of" the cleanup. Federal courts of appeals accordingly would have deemed respondents' claim a "challenge[]" under Section 113(h). See p. 12, *supra*.

The Montana Supreme Court attempted to distinguish federal court of appeals' precedents by observing that those cases did not "involve a claim by private property owners, against another private

party, seeking money damages for the purpose of restoring their own private property." Pet. App. 12a. But such narrow factual differences do not diminish the conflict on the question presented. Nothing about the identity of the litigants or the form of the remedy affects the meaning of "challenge[]" in Section 113(h). Cf. *Giovanni* v. *United States Dep't of Navy*, 906 F.3d 94, 121 (3d Cir. 2018) (Bibas, J., concurring) (explaining "that *who* does an action bears on whether that action meets CERCLA's definitions of 'removal' or 'remedial'").

The Montana Supreme Court's suggestion that respondents' claim is not a "challenge[]" because respondents could "wait" for the EPA "to pull up stakes" before "conclud[ing] their restoration plan" likewise lacks a foundation in the statute. Pet. App. 14a. As its title indicates, Section 113(h) governs the "[t]iming of *review*," not the timing of implementation, of a challenge. 42 U.S.C. 9613(h) (emphasis added). If respondents' restoration-damages claim is a challenge to EPA's response action, the statute withdraws "jurisdiction" to hear that challenge, *ibid.*; it does not permit the court to review the challenge now and authorize its implementation at a later date. See, *e.g.*, *McClellan*, 47 F.3d at 329 (describing Section 113(h) as "a 'blunt withdrawal of federal jurisdiction' * * * that precludes 'any challenges' to * * * a CERCLA plan *during its pendency*") (citation omitted).

2. Notwithstanding the Montana Supreme Court's error, a significant question remains about the scope of Section 113(h). Section 113(h) states that "[n]o *Federal* court shall have jurisdiction * * * to review any challenges" to EPA response actions,

but the statute does not expressly restrict the jurisdiction of *state* courts. 42 U.S.C. 9613(h) (emphasis added). The Montana Supreme Court noted the "conspicuous[]" absence of "any reference to state court jurisdiction" in Section 113(h), but did not resolve the issue because it concluded that respondents' restoration-damages claim was not a "challenge" to an EPA response action subject to Section 113(h)'s withdrawal of jurisdiction. Pet. App. 9a-10a. If this Court were to conclude that respondents' claim was such a "challenge," it would then have to consider whether Section 113(h) withdrew jurisdiction for the state court to review that challenge.

The parties have not briefed that question in depth, and few courts have analyzed it. In the most relevant decision, the Ninth Circuit concluded that a state-court defendant may remove a state-law claim to federal court if the claim constitutes a "challenge to a CERCLA cleanup." *ARCO*, 213 F.3d at 1115. The court reasoned that federal courts have exclusive jurisdiction over such claims pursuant to CERCLA Section 113(b), which provides federal courts with "'exclusive original jurisdiction over all controversies arising under'" CERCLA, subject to exceptions not relevant here. *Ibid.* (quoting 42 U.S.C. 9613(b)). In the Ninth Circuit's view, Section 113(b)'s provision of exclusive jurisdiction over "all *controversies* arising under" CERCLA extends beyond all "*claims* created by CERCLA" and necessarily "cover[s] any 'challenge' to a CERCLA cleanup" under Section 113(h). *Fort Ord Toxics Project, Inc.* v. *California EPA*, 189 F.3d 828, 832 (9th

Cir. 1999) (emphasis added); see *ARCO*, 213 F.3d at 1115.

The Ninth Circuit's reading is persuasive, and the government endorsed it below. See Pet. App. 67a n.2. The decisions in *ARCO* and *Ford Ord*, however, are not directly applicable here. In those cases, state-court defendants removed cases to a federal court, which could then apply Section 113(h)'s command that "no Federal court shall have jurisdiction" over "challenges" to EPA response actions, except in the limited circumstances specified by the statute. 42 U.S.C. 9613(h). But here, petitioner did not remove to federal court on the ground that federal courts had exclusive jurisdiction under Section 113(b). See pp. 4-5, *supra* (explaining other bases for failed removal).[5] Petitioner instead makes the more textually awkward contention that a state court must dismiss the suit based in part on a provision that restricts only federal-court jurisdiction.

Although the statute is far from clear, petitioner's position is likely correct. No plausible basis exists for Congress to "preclude dilatory [CERCLA] litigation in federal courts" under Section 113(h) but "allow such litigation in state courts." *Fort Ord*, 189 F.3d at 832. "Congress' purpose could be thwarted just as easily by allowing state courts to issue injunctions halting CERCLA cleanups." *Ibid.* And while Congress could have chosen a more straightforward way to direct that result, Section 113(h)'s reference to "[f]ederal courts" would make sense if

---

[5] It is unclear why petitioner did not invoke this basis for removal, especially given that the district court in Montana would have been compelled to accept it under the Ninth Circuit's decision in *ARCO*.

"only federal courts * * * have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place." *Ibid.*; cf. *United States* v. *Bestfoods*, 524 U.S. 51, 56 (1998) (observing that "CERCLA, unfortunately, is not a model of legislative draftsmanship") (internal quotation marks and citation omitted).

The matter, however, is not free of doubt. The Tenth Circuit has suggested, without squarely holding, that CERCLA does not bar a Section 113(h) "challenge" in state court, *United States* v. *Colorado*, 990 F.2d 1565, 1579 (1993), and the Minnesota Court of Appeals has adopted that position as a holding, see *In re Williams Pipeline Co.*, 597 N.W.2d 340, 344 (1999). This Court could avoid addressing that threshold issue by waiting to review a case filed in federal court that involves the meaning of "challenge[]" in Section 113(h). Allowing the Montana Supreme Court to remain in place in the interim would have only a limited impact on the implementation of CERCLA. The government was not a party below and is not bound by the court's judgment. If respondents seek to undertake remedial measures that threaten EPA's cleanup, the government can and will use its statutory tools, including administrative orders and enforcement actions, to ensure that its remedy is not undermined. See 42 U.S.C. 9606(a). This Court's review in this case is accordingly not necessary.

C. The Montana Supreme Court's Decision On CERCLA Section 122(e)(6) Is Erroneous But Does Not Warrant This Court's Review

The Montana Supreme Court also erred in concluding that respondents were not PRPs subject to CERCLA Section 122(e)(6)'s requirement to obtain

EPA authorization before proceeding with remediation. Pet. App. 15a-17a. Because the decision does not create a square conflict—and because EPA remains free to enforce Section 122(e)(6)'s requirement against respondents—this Court's review is not warranted.

1. CERCLA Section 122(e)(6) provides that "[w]hen either the President, or a [PRP] * * * has initiated a remedial investigation and feasibility study for a particular facility * * * , no [PRP] may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U.S.C. 9622(e)(6). There is no dispute here that EPA and petitioner (a PRP acting at EPA's direction) have "initiated a remedial investigation and feasibility study for" the Anaconda Smelter site. *Ibid.* There is likewise no dispute that EPA has not "authorized" the "remedial action" respondents propose to "undertake." *Ibid.*; see 42 U.S.C. 9601(24) (defining "remedial action" to include, *inter alia*, "cleanup of released hazardous substances," "dredging or excavation," or "offsite transport and disposition of hazardous substances"). The only dispute is whether respondents are PRPs under Section 122(e)(6).

CERCLA does not expressly define PRPs, but this Court has repeatedly understood PRPs to correspond to the "[c]overed persons" identified in CERCLA Section 107(a), which creates liability for the costs of a CERCLA cleanup (subject to defenses and exceptions elsewhere in Section 107). 42 U.S.C. 9607(a); see *Burlington Northern*, 556 U.S. at 608; *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 131-132 (2007); *Cooper Indus., Inc.* v. *Aviall*

Servs., Inc., 543 U.S. 157, 161 (2004). Of particular relevance here, the covered persons identified in Section 107(a) include the "owner" of a "facility,"42 U.S.C. 9607(a)(1), which is defined as "any site or area where a hazardous substance has been deposited," 42 U.S.C. 9601(9). Because respondents own land within the Superfund site, they are PRPs under a straightforward reading of the statutory text.

2. The Montana Supreme Court acknowledged that PRPs include "all current owners of property at a CERCLA facility," a "category" that includes respondents. Pet. App. 15a. The court declined to "treat [respondents] as PRPs under [Section] 122(e)(6)," however, because respondents were not responsible for the contamination or the costs of the cleanup. *Ibid.* That reading mistakenly conflates *status* as a PRP with *liability* for costs. Cf. Br. in Opp. 31-32 (contending that respondents are not PRPs because "they face no prospect of liability"). To be sure, respondents are not liable for cleanup costs under Section 107(a), because they did not cause the contamination. See 42 U.S.C. 9607(b)(3) (providing a liability defense for innocent landowners). But that does not mean respondents are not PRPs. As this Court has explained, "even parties not responsible for contamination may fall within the broad definitions of PRPs in" Section 107(a). *Atlantic Research*, 551 U.S. at 136. One reason is that Section 107(a) allows some PRPs to "*recover*[] cleanup costs" in some cases. *Ibid.* (emphasis added); see 42 U.S.C. 9607(a)(4)(B). Thus, even an "'innocent' * * * landowner whose land has been contaminated by another" party may be—and benefit from being—a PRP. *Atlantic Research*, 551 U.S.

at 136. The Montana Supreme Court's contrary reasoning contradicts both the statute and this Court's precedent.

3. The Montana Supreme Court's error, however, does not warrant this Court's review. CERCLA Section 122(e)(6) is a rarely litigated provision, and petitioners do not identify any decision that squarely conflicts with the holding of the decision below. Moreover, as noted above, EPA is not a party and therefore is not bound by the court's conclusion that respondents are not PRPs under Section 122(e)(6). Indeed, EPA informed respondents in April 2018 that the government considers them PRPs for purposes of Section 122(e)(6) and that they cannot proceed with any remedial action without EPA's authorization. Respondents do not appear to dispute this understanding. The Montana Supreme Court error on this issue accordingly has little practical effect.

D. The Montana Supreme Court's Preemption Decision Is Erroneous But Does Not Warrant This Court's Review

Finally, the Montana Supreme Court erred in concluding that CERCLA does not preempt respondents' restoration-damages claim. As EPA explained below, respondents' claim would impermissibly conflict with CERCLA even if it does not amount to a "challenge[]" expressly barred by Section 113(h), 42 U.S.C. 9613(h). The Montana Supreme Court erroneously rejected that argument in a single paragraph that relied largely on CERCLA's savings clauses. Pet. App. 17a-18a. The court's decision, however, does not create any square conflict, and its practical consequences are limited by the EPA's continuing enforcement authority.

1. "[C]onflict pre-emption exists where" a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (internal quotation marks and citation omitted). Respondents' state-law restoration-damages claim here would stand as an obstacle to the purposes of CERCLA in multiple ways. Most clearly, allowing respondents "to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan," Pet. App. 13a, conflicts with CERCLA's directive that "the President select appropriate remedial action" for a Superfund site, 42 U.S.C. 9621(a), under particular criteria specified by Congress, 42 U.S.C. 9621(a)-(b). Allowing a Montana jury to prescribe restoration measures likewise circumvents the "substantial and meaningful involvement" for States that CERCLA expressly requires. 42 U.S.C. 9621(f). Respondents' claim thus inherently conflicts with "the methods by which the federal statute was designed to reach its goal." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 479 (1987) (concluding that the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, preempted state nuisance-law claim). And as explained above, the conflict here is especially stark because several aspects of respondents' plan expressly contradict the remedy EPA devised. See pp. 12-14, *supra*.

2. The Montana Supreme Court did not seriously grapple with the arguments for conflict preemption. The court instead asserted that respondents' claim did not conflict with CERCLA for "the same reason

that" Section 113(h) did not bar jurisdiction: respondents' "claim does not prevent the EPA from accomplishing its goals at" the site. Pet. App. 17a. The court also relied heavily on CERCLA's savings clauses, which, in the court's view, "operate to preserve" respondents' "ability to pursue this claim." *Id.* at 17a-18a.

That reasoning is flawed. As just explained, respondents' claim conflicts with CERCLA in multiple significant ways, even if it does not constitute a "challenge" under Section 113(h). And this Court has repeatedly made clear the presence of saving clauses "does *not* bar the ordinary working of conflict pre-emption principles." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000); see *Ouellette*, 479 U.S. at 494, 497 (finding conflict preemption under the CWA despite savings clauses); see also *New Mexico*, 467 F.3d at 1247 (same under CERCLA).

3. Although the Montana Supreme Court's preemption decision was incorrect, it does not create any square conflict in authority. No federal court of appeals or other state court of last resort has addressed whether CERCLA preempts a restoration-damages claim—a question that does not appear to have arisen with any frequency in other States. And although the Montana Supreme Court placed too much reliance on CERCLA's savings clauses, it did not, as petitioner suggests (Pet. 23), hold "that CERCLA's savings clauses categorically save all state common-law claims from preemption." Finally, as discussed elsewhere, EPA has authority to protect its response action against any conflicting actions by respondents. See 42 U.S.C. 9606(a). The court's

misguided preemption holding does nothing to diminish that authority, and the limited practical effect of the decision does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
ERIC GRANT
Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
MATTHEW R. OAKES
Attorney

OCTOBER 2019